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Attorneys for Jason W. Ellsworth and  
Countrywide Periodicals, LLC

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF:

CIVIL INVESTIGATIVE DEMAND ISSUED  
ON MAY 6, 2013, TO COUNTRYWIDE  
PERIODICALS, LLC

FILE NO. 123145  
PETITION TO QUASH

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PURSUANT to 16 C.F.R. § 2.7(d), Countrywide Periodicals, LLC (CWP) and Jason W. Ellsworth (Ellsworth), by and through their counsel, respectfully PETITION this Commission to quash the Civil Investigative Demand (CID) issued on May 6, 2013, in its entirety. CWP objects to and seeks to quash the CID as being improper and unenforceable for two separate and distinct reasons. First, several of the requests propounded under the CID exceed the nature and scope of the investigation as set forth in the Resolution Directing Use of Compulsory Process in a Non-Public Investigation of Telemarketers, Sellers, Suppliers or Others for File Number 123145. Second, the entire CID is unduly oppressive considering the previous FTC litigation against Your Magazine Provider, Inc. *Case CV-08-64-M-DWM, District of Montana (Stipulated Final Judgment and Order for Permanent Injunction* attached as Exhibit 1).

## BACKGROUND

CWP is a magazine service company producing sales via telemarketing and is owned by Jason W. Ellsworth. Ellsworth was also the majority owner of Your Magazine Provider, Inc. (YMP). CWP's business model and operations are essentially the same as YMP, which ceased operations more than a year ago.

On May 14, 2008, upon application made by the FTC and without notice to YMP or Ellsworth, the District Court of Montana entered a Temporary Restraining Order and Asset Freeze against YMP and Jason W. Ellsworth. The Court's Order was premised on the FTC's allegations that YMP and Ellsworth were violating the FTC Act and the Telemarketing Sales Rule (TSR). After the conclusion of the Show Cause hearing on May 29, 2008, the parties entered into a Stipulated Preliminary Injunction including a partial asset freeze dated June 5, 2008. After more than six months of discovery, monitoring of YMP by the FTC, and failed negotiations to settle, YMP and Ellsworth moved the Court to dissolve the Stipulated Preliminary Injunction. On February 4, 2009, the Court entered an Order dissolving the Stipulated Preliminary Injunction and accompanying partial asset freeze. (Attached as Exhibit 2). In part, the Court stated, "[a]fter considering the evidence presented by the parties at the show cause hearing, as well as the additional evidence submitted by the FTC with its briefing on this motion, the FTC is unlikely to succeed on the merits of its claims." *Exhibit 2 at p.2, ll.10-12*. The parties eventually reached a settlement that was memorialized as the Stipulated Final Judgment and Order for Permanent Injunction dated October 7, 2009. *Exhibit 1*.

YMP suspended operations for less than one week after the initial Temporary Restraining Order and Asset Freeze was entered without notice to YMP or Ellsworth on May 14, 2008. Prior to resuming sales operations, YMP made one change to their sales scripts at the request of the

FTC – the word “rescind” was changed to “cancel.” This change was also made contemporaneously to the scripts used by CWP. During the more than sixteen months that the litigation was active and YMP continued sales operations, the FTC had the opportunity to monitor thousands of recordings of customer sales transactions, interview current and former employees, and review sales scripts. It is inconceivable that the FTC entered into the Stipulated Final Judgment and Order for Permanent Injunction without having the opportunity to thoroughly review all of YMP’s sales practices. Tellingly, the Stipulated Final Judgment and Order for Permanent Injunction does not include any additional prohibitions on YMP’s sales practices nor were any modifications to the sales processes requested or required.

## **ARGUMENT**

Petitioners acknowledge that the FTC has statutory authority to investigate practices that it reasonably believes may constitute deceptive or unfair trade practices in violation of the FTC Act and/or the Telemarketing Sales Rule (TSR). However, these powers are not limitless and should be tempered by actual legal restraints imposed by the federal courts and the fair-minded oversight of the FTC Commissioners.

### **1. The CID clearly exceeds the Nature and Scope of the Resolution.**

The Resolution Directing Use of Compulsory Process in a Non-Public Investigation of Telemarketers, Sellers, Suppliers or Others for File Number 123145 defines the nature and scope of the investigation as, “[t]o determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission’s Telemarketing Sales Rule ...” However, the Requests for Production and

Interrogatories that comprise the CID in this case read much more like a litigation checklist than an inquiry to determine if violations have occurred.

Requests for Production numbers 1-4 are all related to CWP's contractual agreements with Magazine Clearinghouses. It is difficult to imagine how CWP's relationship with its vendors is reasonably related to an inquiry into alleged unfair, deceptive or abusive acts or practices involving consumers. Similarly, Request for Production 10 seeks CWP's sources for all lead lists. Again, how are lead sources relevant to the stated nature and scope of investigation? Request for Production 14, which seeks merchant account information, should make it abundantly clear that the purpose of this CID is to prepare for litigation, not simply to, "determine whether unnamed telemarketers ... have engaged or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce ... and/or (2) deceptive or abusive telemarketing acts or practices..."

There are separate concerns related to several other Requests for Production. Specifically, Requests for Production 5 and 13 are overly broad and unduly burdensome to CWP and potentially require the disclosure of protected personal information of customers and employees. Do CWP's customers have any say in whether or not the government has access to records showing what reading materials they enjoy? If CWP is forced to comply with Request for Production 5, the FTC will have access to, "the magazine titles to which the customer subscribes." Do CWP's former employees have any privacy rights concerning the potential reasons for termination of employment as sought by the FTC in Request for Production 13? CWP is essentially the guardian of its customers' and employees' private information. The FTC should be required to show a specific need for this information. Instead, the FTC simply says

that we cannot tell you why that information is relevant to the inquiry at hand. That cannot be good enough.

In total, CWP and Ellsworth object to Requests for Production 1,2,3,4,5,6,9,10,13 and 14 and Interrogatory 1 as overly burdensome, beyond the scope and nature of the investigation, and/or seeking protected, private information of customers and employees. Specifically, (1) Requests for Production 1,2,3,4,5,6,9,10,13 and 14 and Interrogatory 1 are clearly outside the stated nature and scope of the investigation; (2) Requests for Production 5,10,13 and Interrogatory 1 are also overly burdensome; and (3) Requests for Production 5,13 and Interrogatory 1 seek to force CWP to disclose private information of customers and employees without their consent. Simply put, this CID is a fishing expedition, not a reasonably relevant inquiry into whether the FTC Act or the TSR has been violated. In addition, CWP and Ellsworth are aware that a separate CID supported by the same Resolution has been sent to Farmer's State Bank – again, how are bank accounts relevant to whether or not the FTC Act or TSR have been violated?

**2. The CID is oppressive, punitive and intended to harass CWP and Ellsworth.**

While the FTC has the authority to investigate suspected violations; that authority should be accompanied with the responsibility to ensure that those powers are not used simply to harass and punish targeted entities. When parties reach a settlement with the FTC, they should be able to rely on the fact that the FTC is acting in good faith and truly considers the matter closed. Of course, the FTC has the authority and obligation to examine additional violations; however, in the instant case, CWP is operating virtually exactly as YMP was at the time of the settlement with the FTC.

At the time of the settlement of the FTC case against YMP, the FTC had had more than sixteen months to examine the operations of YMP. The FTC had access to all customer recordings, all sales scripts, and interviewed dozens of current and former employees. Some of these former YMP employees were currently CWP employees when they were actually interviewed. For this entire time, the FTC was aware of the existence of CWP, Ellsworth's ownership of CWP, and that the business practices of YMP and CWP were identical.

Any modifications to CWP's business practices since October 7, 2009, were made after consultation with the Better Business Bureau (BBB) office in Spokane, Washington. CWP and Ellsworth reached out to the BBB in part because the impetus for the 2008 action against YMP was clearly the BBB's "investigation" of YMP. For the past several years, CWP and Ellsworth have had significant, open communication with the BBB. The BBB has had access to any customer recordings it has requested and has had input on sales scripts. According to the primary contact for CWP at the BBB, the FTC did not even contact the BBB before issuing the CID. While the FTC is apparently not legally obligated to perform even a cursory informal inquiry before imposing the significant hardship of a CID on a targeted business, in this case, considering the history, it seems that such an action would have been advisable.

As is apparently the consistent practice, FTC counsel claims that it cannot discuss the reason for a CID or the basis for an investigation with the subject business or its counsel. Therefore, CWP and Ellsworth are clearly at a disadvantage concerning what legitimate reasons, if any, FTC counsel had for issuing this CID and the CID to Farmer's State Bank. Due to the refusal to divulge any information, CWP and Ellsworth have no idea what justification there could possibly be for harassing and embarrassing them with this CID and the CID served on their

local bank, or why the FTC needs banking information before determining that any violations have even occurred. Fortunately, the FTC Commissioners are not similarly disadvantaged.

This petition is, in large part, a plea to the Commissioners to examine the legitimacy of this CID and investigation of CWP and Ellsworth in general. There are simply too many questions that CWP and Ellsworth have been denied the ability to even meaningfully address. Based on the information that is available to CWP and Ellsworth, there does not seem to be any significant reason for the FTC to re-open these issues. Surely, the FTC entered into the Stipulated Final Judgment and Order for Permanent Injunction dated October 7, 2009, in good faith. Without question, the FTC had ample opportunity to examine the then current business practices of YMP and, by extension, CWP. CWP's business practices are essentially the same now with only minor modifications made to further insure compliance with the FTC Act, the TSR and other applicable regulations and to address any concerns raised by the BBB.

### **CONCLUSION**

Countrywide Periodicals, LLC and Jason W. Ellsworth petition the FTC Commissioners to quash the subject CID in part because it does exceed the restrictions placed on agency investigative power by federal courts. However, the primary focus of this petition is to genuinely ask the Commissioners to review the legitimacy of this CID as it relates to FTC policy.

Obviously, this petition does not read like the typical dry run for a future filing with a federal court as CWP and Ellsworth are not simply going through the required motions before asking a court to intercede. CWP and Ellsworth are petitioning and imploring the Commissioners to do what the courts cannot – examine the basis for this CID in detail considering the 2008 FTC action against YMP and the resulting Stipulated Final Judgment and

Order for Permanent Injunction. If the FTC does not have a reasonable basis for believing that CWP's business practices have changed since the settlement was reached and now likely violate the FTC Act and/or the TSR, is there a legitimate reason to further burden and harass CWP and Ellsworth? Please utilize your oversight authority to truly examine whether this CID is appropriate and is consistent with the FTC's mission and policies.

Dated this 31<sup>st</sup> day of May, 2013.

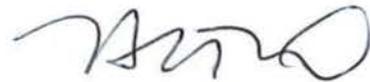
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**CERTIFICATION OF GOOD FAITH MEET AND CONFER CONFERENCE**

Pursuant to 16 C.F.R. §2.7(d)(2), counsel for Petitioner conferred with Megan Bartley and Jonathan Cohen, counsel for the Commission, on Tuesday, May 28, 2013, at 4:00pm in a good faith effort to resolve by agreement the issues raised in this Petition. However, we were not able to reach an agreement.



Hank T. Waters

**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of May, 2013, I served true and correct copies of the foregoing document via Federal Express for delivery on Monday morning, June 3<sup>rd</sup>, 2013, postage prepaid, to the following:

Megan Bartley  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mail Stop M-8102B  
Washington, DC 20580  
[mbartley@ftc.gov](mailto:mbartley@ftc.gov) (e-mailed on May 31, 2013)

Donald Clark, Secretary (original and 12 copies plus pdf version)  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Room H-113  
Washington, DC 20580



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Hank T. Waters